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ABSTRACT

This paper analyzes how absolutist arguments against campus harassment codes violate the spirit of the first amendment, examining in particular the United States Supreme Court ruling in "RAV v. St. Paul." The paper begins by tracing the current development of first amendment doctrine, analyzing its inadequacy in the campus hate speech debate. Next, the paper examines 22 law-review articles written in 1990-91 on campus codes, analyzing the authors' various proposals for reconciling constitutional requirements for free speech and equal protection on campuses, and especially noting the philosophy underlying the authors' recommendations for limiting hate speech. The paper shows that most commentators approved of speech codes restricting one-on-one encounters aimed at intimidating individuals because of their race, sex or other suspect category, in contrast to the majority ruling in RAV. Finally, the paper attempts to analyze the RAV ruling's impact on campus speech codes and first amendment doctrine. One hundred and seventeen footnotes are included. (SR)

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STICKS AND STONES:

Why First Amendment Absolutism Fails When Applied to Campus Harassment Codes

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The U.S. Supreme Court's June 22, 1992, ruling in *RAV v. St. Paul* rendered unconstitutional any campus speech codes that proscribe only certain categories of hate speech, such as barbs targeted at one's race, sex or religion.[1] All slurs are equal, five justices said. [2] Further, the majority opinion also made it tougher to construct general speech codes, since it ruled that only the mode but not the message of so-called "fighting words" is unprotected by the first amendment.[3] The majority said harassing or intimidating modes of communication can be prevented through general criminal laws and, by extension, general college conduct codes that do not single out racist taunts or other categories of hate speech. The majority opinion not only is at odds with the four concurring justices but with a growing number of legal critics and civil rights experts who say hate speech causes real harm that justifies limited content-based restrictions upon it.[4]

The purpose of this paper is to analyze how absolutist arguments against campus harassment codes violate the spirit of the first amendment. Even *The New York Times* noted the *RAV* ruling's "tone of arid absolutism."[5] Many legal experts believe the *RAV* ruling invalidates all campus speech codes, but some college administrators predict a second Supreme Court ruling will be necessary to make clear what kinds of college codes are permissible.[6] The ruling's impact is important because the conflicting interests of civil liberties and civil rights inherent in the hate-speech debate are paramount

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[1]1992 WL 135564 (U.S.).

[2]The majority opinion written by Justice Antonin Scalia was joined by Chief Justice William Rehnquist and Justices Anthony Kennedy, David Souter and Clarence Thomas. Id.

[3]315 U.S. 568 (1942). Fighting words were described as whose "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. at 572.

[4]In *RAV*, briefs to the effect hate speech causes real harm that cannot be adequately addressed by general penal codes were filed by seventeen states, the National Association for the Advancement of Colored People, the Young Women's Christian Association, the United Auto Workers of America and a number of civil rights organizations. Amicus curiae briefs, RAV v. St. Paul, (No. 90-7675).

[5]Linda Greenhouse, *2 visions of free speech*, The New York Times, June 27, 1992, at A11.

[6]William Celis 3d, *Universities reconsidering bans on hate speech*, The New York Times, June 27, 1992, at A11.

among American values. The conflict between the occasionally competing claims of the first amendment's guarantee of free speech and fourteenth amendment's guarantee of equal protection will "increasingly become one of the deepest and most trying dilemmas of our time," predicts Robert O'Neil, director of the Thomas Jefferson Center for Free Expression at the University of Virginia.[7] *RAV* probably is not the last word on the subject.

The paper does not attempt to argue that the *RAV* guidelines for fighting hate speech--punishing through general codes any conduct associated with odious but constitutionally protected messages--are necessarily inadequate to prevent hate speech. Universities probably can make their codes constitutional by forbidding harassment or intimidation against any of its students, not just some of them. But the paper does attempt to examine the values at work in the justices' decision that vile forms of hate speech cause no special harm to minorities, let alone sufficient harm to justify restrictions upon it. As the paper will show, the Supreme Court has not been loathe to approve content-based bans under other circumstances. And the Court ignored voluminous amicus curiae briefs explaining why hate speech causes special harm to individual victims as well as the community. That the majority went to such theoretical lengths to condemn content-based bans on hate speech--especially since the St. Paul law in question concerned only previously unprotected fighting words--serves as a warning that the Court will not allow minorities any breaks in their quest for equality despite the nation's onerous history of discrimination.

The paper begins by tracing the development of current first amendment doctrine, analyzing its inadequacy in the campus hate speech debate. An extensive literature review examines 22 law-review articles written in 1990-91 on campus codes, analyzing the authors' various proposals for reconciling constitutional requirements for free speech and equal protection on campuses.[8] This paper is

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[7]Arthur S. Hayes *Stroh's case pits feminists against ACLU*, The Wall Street Journal (Nov. 14, 1991), at B6.

[8]The articles comprise all those listed for those years discovered in a literature search of the computerized LegalTrac index.

especially concerned with the philosophy underlying those authors' recommendations for limiting hate speech. The paper shows that most commentators approved of speech codes restricting one-on-one encounters aimed at intimidating individuals because of their race, sex or other suspect category, in contrast to the majority ruling in *RAV*. This paper will call them "harassment codes." The paper then will attempt to analyze the *RAV* ruling's impact on campus speech codes and first-amendment doctrine.

THE HATE SPEECH DEBATE ON CAMPUS

Over the past decade, minorities arriving on college campuses have been greeted with a resurgence of racism sparking hundreds of ugly encounters.[9] Universities skirted a collision course between protecting minorities and free speech as they attempted to combat campus racism by creating or expanding upon campus conduct codes to include slurs against a spiralling list of categories including race, sex, religion, ethnicity, sexual orientation and handicap.[10] Speech codes are estimated to exist on hundreds of college campuses.[11] The courts first addressed campus codes in 1989 when, in *Doe v. University of Michigan*, a federal district court ruled unconstitutionally overbroad and vague that school's speech code.[12]

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[9]The National Institute Against Prejudice and Violence, based in Baltimore, Md., tabulated more than 250 racial incidents at more than 200 colleges between 1986 and 1991. The Center for Democratic Renewal in Atlanta, Ga., reported such incidents have quadrupled since 1985. Dinesh D'Souza, ILLIBERAL EDUCATION (New York: The Free Press), at 125. Nearly 200 campuses experienced racist incidents significant enough to warrant coverage by the press in 1989-91/ Richard Delgado, *Campus antiracism rules: constitutional narratives in collision*, 85 Northwestern University L.Rev. 343 (1991).

[10]Brown University's code, for instance, forbids subjecting "another person, group or class of persons to inappropriate, abusive, threatening or demeaning actions based on race, religion, gender, handicap, ethnicity, national origin or sexual orientation." D. Moran McIvar, *Brown expels student for using racial, sexual slurs*, Providence Journal-Bulletin (Feb. 12, 1991), at A1, A7. The codes at Brown and other private universities do not need to withstand constitutional scrutiny.

[11]Mary Jordan, *Ruling seen stifling controversial campus speech codes*, The Washington Post, June 23, 1992, at A6.

[12]721 F.Supp. 852 (E.D. Mich. 1989). As an example of how broadly it swept, the code was used to discipline a dental student who said during a classroom discussion that he heard minorities had a difficult time in a preclinical dental

However, the court said some regulations against hate speech may be constitutionally permissible, including those restricting fighting words.[13] In October of 1991, the University of Wisconsin lost a lawsuit challenging its codes filed by the American Civil Liberties Union on behalf of the student newspaper, 10 students and an adjunct professor.[14]

College educators also have addressed campus codes, usually with hostility. In June, the American Association of University Professors condemned speech codes. "On a campus that is free and open, no idea can be banned or forbidden," the group declared.[15] A *Chronicle of Education* columnist pleased that the *RAV* ruling will eradicate speech codes in the next breath urged universities to use criminal statutes to aggressively punish racist conduct or other illegal intimidation of any minorities.[16] The Association for Education in Journalism and Mass Communication officially opposed hate speech codes in August, 1991.[17] In 1990, both the Duke University School of Law and the Institute of the Bill of Rights Law at the College of William and Mary sponsored symposiums on the hate-speech debate.[18]

In the 22 law review articles on campus codes described here, 14 authors deem constitutionally acceptable some limited form of regulation of campus hate speech. Six authors oppose any kind of code, while two authors discuss campus codes without commenting specifically on their constitutionality. Even those first amendment absolutists who oppose any form of speech regulation express their abhorrence of the rising tide of racism on campus. They offer the

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class. He was forced to receive 'counseling' and write a letter of apology to the professor after she filed a complaint under the code. Id. at 866.

[13]*Id.* at 862.

[14]University of Wisconsin-Madison Post Inc. v. Regents, U. of Wisconsin 90-C-328 (E.D. Wis.)

[15]Jordan, *Ruling seen stifling*, W.Post, June 23, 1992, at A6.

[16]Robert M. O'Neil, *A time to re-evaluate campus speech codes*, The Chronicle of Higher Education (July 8, 1992), at A40.

[17]*AEJMC and the 'hate speech' issue*, AEJMC News, Vol. 25 (November 1991) at 2, 3.

[18]Rodney A. Smolla, *Introduction: Exercises in the regulation of hate speech*, 32 William and Mary Law Review 207 (1991).

traditional liberal first amendment argument that hate speech can best be combated in the marketplace of ideas.

LIBERAL FIRST AMENDMENT THEORY APPLIED TO HATE SPEECH

Contemporary first amendment doctrine stretches back centuries to the philosophy of John Milton and John Stuart Mill. Milton first articulated the belief truth will prevail in the marketplace when he protested book licensing in 1644: "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worst, in a free and open encounter?"[19] In the nineteenth century, Mill expanded upon those sentiments when he formulated a classic libertarian defense of free expression in On Liberty.[20] Mill argued suppressing opinion is wrong because, if it is true, society is denied the truth; if it is false, society is denied the fuller understanding of truth that arrives from a full airing of competing views. In this century, Justice Holmes in his famous dissent in *Abrams v. U.S.* further articulated the concept when he wrote "the best test of truth is the power of the thought to get itself accepted in the competition of the market... "[21] Ever since Alexander Meiklejohn suggested an absolute approach to the first amendment, twentieth-century first amendment theorists have touted the marketplace of ideas as virtually the only way to ensure free speech. Yet a closer examination of scholarly writings and Court decisions on which contemporary first amendment jurisprudence is based shows none would protect all speech. Milton would have censored Catholics, Mill found indecent activities outside the realm of worthy expression. Neither would Mill protect speech that interfered with others' enjoyment of their rights: "The liberty of the individual must be thus

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[19]John Milton, *Aeropagitica - A speech for the liberty of unlicensed printing to the Parliament of England*, in THE HARVARD CLASSICS (New York, P.F. Collier & Son),1909, v. 3, at 239.

[20]John Stuart Mill, ON LIBERTY (London: Penguin Books Ltd.), 1988.

[21]250 U.S. 616, 630 (1919).

far limited; he must not make a nuisance to other people."[22] And while the Supreme Court has declared "there is no such thing as a false idea,"[23] it has ruled as unprotected several categories of expression, including obscenity,[24] libel[25] and fighting words.[26] It also has said the government can regulate expressive conduct if it serves a legitimate governmental interest.[27]

Despite their rhetoric, neither did twentieth-century first amendment scholars intend every utterance find sanctuary under the umbrella of the first amendment. An analysis of some of the modern era's major works on first amendment theory shows even their so-called "absolute" approach probably fails to protect hate speech directed at individuals in a harassing manner. Meiklejohn, for instance, also has said, "In any well-governed society, the legislature has both the right and the duty to prohibit certain forms of speech."[28] Martin Redish's self-realization theory holds that individuals may be free to express themselves any way they like - as long as they harm no one else. "Thus, I frankly recognize the need for the judiciary to reconcile the free speech right with competing governmental interests."[29] C. Edwin Baker's liberty model of first amendment jurisprudence would extend protection to a "broad realm of noncoercive, nonviolent activity."[30] But his definition of uncovered coercive activities would tend to preclude verbal harassment: "Coercive activities typically disregard the ethical principle that, in interactions with others, one must respect the other's autonomy and integrity as a person. ...The type of speech that manifestly disregards the other's will or the integrity of the other's

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[22]Mill, LIBERTY.

[23]Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

[24]Miller v. California, 413 U.S. 45 (1973).

[25]New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[26]Chaplinsky v. New Hampshire, 315 v. 568 (1942).

[27]U.S. v. O'Brien, 391 U.S. 367 (1968).

[28] Alexander Meiklejohn, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (New York: Harper & Brothers), 1960) at 21.

[29]Martin Redish, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (Charlottesville, Va.: Michie Co.),1984, at 8.

[30]C. Edwin Baker, *Scope of the First Amendment*, 25 UCLA L. Rev. 964, 990 (1978).

mental processes is not protected."[31] While not referring to speech used to intimidate others, Baker's sensitivity toward the listener's first amendment rights seems applicable to the first amendment rights of victims of hate speech. "The listener uses speech for self-realization or change purposes and these uses provide the basis of the listener's constitutional rights."[32] Even Thomas I. Emerson, perhaps the most adamant champion of unlimited free expression, would treat universities as a special case. "The position of the university as a community within a community ... carries certain implications for freedom of expression as practiced and protected within its walls. For one thing the university has at least a limited custodianship over the students and a resulting obligation that no harm come to them while they are on the campus. ... In addition, as an autonomous community the university would have authority to assure minimum conditions of order and safety within its borders.[33]

These statements underscore the kind of speech which concern free speech scholars. When they discuss the value of speech, philosophers and scholars refer to the uplifting value of ideas for individuals and society as well as the value of freedom to criticize government and powerful institutions. It is abundantly clear from their writings that the framers and champions of the first amendment saw it as a tool of the disempowered. Redish extended his self-realization principle only to "the broad range of expressive activity that fosters the values of the first amendment..."[34] Those values would seem to exclude racial epithets as espoused in Emerson's theory of freedom of expression : "It contemplates a mode of life that, through encouraging tolerance, skepticism, reason and initiative, will allow man to realize his full potentialities."[35] Justice Brandeis, lauded for his contribution to first amendment

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[31]*Id.* at 1001.

[32]*Id.* at 1007.

[33]Thomas I. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION (New York: Random House, 1970), at 621.

[34]Redish, FREEDOM, at 5.

[35]Thomas I. Emerson, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (New York: Random House, 1966), at 14.

jurisprudence, was equally if not more concerned with the right of privacy. His thoughts on the matter seem applicable to today's debate on the constitutionality of campus harassment codes. "The right to be left alone [is] the most comprehensive of rights and the right most valued by civilized men."[36]

More recently, some scholars have argued the marketplace of ideas is a myth and not broad enough. Stanley Ingber in 1984 said the marketplace supports entrenched power structures, allowing for little more than "fine-tuning among established groups" while maintaining the myth that all citizens have an equal voice within the system.[37] "If the government wishes to preserved the myth of a free market, it cannot overtly prefer some messages over others," Ingber wrote.[38] One result of this subterfuge, according to Ingber, is that attention from critics' message can be diverted from substantive problems to procedural debates. "For example, rather than focusing on whether the military draft should be reinstated, the debate may well center on whether antidraft groups should be allowed to stage a massive demonstration in a business district."[39] As applied to the hate-speech debate, public attention indeed has been diverted from the rise in campus racism to free-speech concerns. Ingber's critique of the marketplace is largely inapplicable to hate speech, however, because it deals solely with the need to put social critics on equal footing with entrenched governmental and business powers so that the disempowered critics can effect social change. He maintains first amendment theory "usually emphasizes the interest of audiences," which is untrue in the hate-speech debate and evidence of his approach's inapplicability to hate speech.[40] It is difficult to believe his call for a broader first-amendment theory of "freedom of conduct" means he approves of protecting midnight cross burnings in backyards. Like other theorists before him, Ingber appears only

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[36]Olmsted v. U.S. 277 U.S. 438, 478 (1928).

[37]Stanley Ingber, *The marketplace of ideas: A legitimizing myth*, 1984 Duke L. J. 1, 90.

[38]Id. at 81.

[39]Id. at 20.

[40]Id. at 77.

concerned that the disempowered have an adequate forum to question the powerful.

Ronald Dworkin, however, believes overreliance on the marketplace metaphor has overemphasized the value of political speech all other forms of expression. He says that conception of the first amendment falls into the "instrumental" approach to justifying the free-speech clause. He prefers the "constitutive" approach, in which speech is an end in itself. That broader view requires government to treat is citizens as "responsible moral agents."[41] Writing on the eve of the RAV ruling, he anticipated the Court's rationale it reject regulations of hate speech.

> It is very important that the Supreme Court confirm that the First Amendment protects even such speech; that it protects, as Holmes said, even speech we loathe. That is crucial for the reason that the constitutive justification of free speech emphasizes; because we are a liberal society committed to individual moral responsibility, and any censorship on grounds of content is inconsistent with that commitment.[42]

The failure to recognize hate speech does not fall within the context of established first amendment theory has inspired several legal scholars over the past decade to challenge absolutism as inadequate for dealing with the complexities of hate speech. These scholars call attention to the incongruity of extending the umbrella of the first amendment to powerful speakers abusing the disempowered. Harassment code opponents, for instance, often cite the ruling in *Cohen v. California* that even offensive speech is protected.[43] What they overlook is that Cohen's jacket bearing the words "Fuck the Draft" was profanely analogous to David facing Goliath; the Court realized the weaker individual needed protection to stand up to the much more powerful government. Constitutional

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[41]Ronald Dworkin, The coming battles over free speech, The New York Review of Books (June 11, 1992), at 55, 56-57.
[42]Id. at 58.
[43]403 U.S. 15 (1971).

protection of offensive speech was reiterated in the 1989 flag-burning case,[44] but again the Court favored protecting an individual protest against a powerful government. The balance of power shifts when racist epithets are directed against minorities at mostly white schools. A further examination of first amendment jurisprudence shows the courts have overlooked how some speech can silence listeners, effectively quashing their free speech rights. Kent Greenawalt offers as an example the fighting words doctrine that ruled unprotected only speech which provokes a violent response. But what about listeners intimidated into silence, as when an individual is assaulted by hate speech?[45] Similarly, the *New York Times Co. v. Sullivan's* ideal of "uninhibited, robust, and wide-open debate"[46] is not furthered when racial epithets inhibit individual minority students from participating in campus life. What follows is an examination of the work by two legal scholars whose critical evaluation of marketplace theory has widely influenced the current debate on the constitutionality of campus harassment codes.

THE EMERGENCE OF OUTSIDER JURISPRUDENCE

A 1982 law review article by Professor Richard Delgado began the trend toward reevaluating marketplace theory in the context of hate speech. "Words That Wound" suggested a tort remedy for hate speech.[47] Delgado argues victims of hate speech suffer real psychic harm which falls outside the realm of the marketplace of ideas. "Generally, empowered persons will favor competition and the marketplace of ideas, while those lacking a strong voice will view the universalizing, quasi-objective values of the marketplace of ideas with mistrust and will prefer the more contextualized perspectives

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[44]Texas v. Johnson , 491 U.S 397 (1989).

[45]Kent Greenawalt, *Insults and epithets: Are they protected speech?* 42 Rutgers L. Rev. 287 (1990). Greenawalt writes, "The *Chaplinsky* language reflects the propensity of courts to imagine male actors for most legal problems." Id. at 296-297.

[46]376 U.S. 254, 270 (1964).

[47]Richard Delgado, *Words that wound: A tort action for racial insults, epithets, and name-calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982).

afforded by equal protection analysis."[48] Racist speech's group dimension is the key to recognizing its power and providing equal protection for minorities. "Yet the prevailing first amendment paradigm predisposes us to treat racist speech as an individual harm ... This approach - corresponding to liberal, individualistic theories of self and society - systematically misperceives the experience of racism for both victim and perpetrator." [49] He argues that racist speech violates the spirit of the first amendment. "Uttering racial slurs ... hardly seems essential to self-fulfillment in any ideal sense. Indeed social science writers hold that making racist remarks impairs, rather than promotes, the growth of the person who makes them, by encouraging rigid, dichotomous thinking and impeding moral .development. Moreover, such remarks serve little dialogic purpose; they do not seek to connect the speaker and addressee in a community of shared ideals. ... Additionally, slurs contribute little to the discovery of truth. ..."[50]

Five years after Delgado, David Kretzmer discussed the "illusory nature" of the first amendment's absoluteness.[51] He argues racist speech is unique because of its catastrophic history and the universal condemnation of racism. He contends it inflicts real harm, including the spread of prejudice and its assault on individual dignity. He favors shifting the emphasis from freedom of speech to the ideal of equality.

In 1989, Professor Mari Matsuda went further than either Delgado or Kretzmer to suggest formal criminal and administrative sanctions as responses to hate speech. Matsuda's position is informed by her view that "outsider jurisprudence" will help resolve "the seemingly irresolvable conflicts of value and doctrine that characterize liberal thought."[52] She defines outsider jurisprudence as a methodology of

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[48]Richard Delgado, Campus Antiracism rules: Constitutional narratives in collision, 85 Northwestern University L. Rev. 343. 385, n. 344.

[49]Id. at 384.

[50]Id. at 379.

[51]David Kretzmer, *Freedom of speech and racism*, 8 Cardozo L. Rev. 445, 473 (1987).

[52]Mari Matsuda, *Public response to racist speech: considering the victim's story*, 87 U. Michigan L. Rev. 2320, 2321 (1989).

people of color and women which recognizes law is basically political.[53] "The need to attack the effects of racism and patriarchy in order to attack the deep, hidden, tangled roots characterizes outsider thinking about law."[54] Matsuda is a Japanese-American woman who describes incidents in which she was the victim of racism. She cites psychosocial and psycholinguistic research indicating that hate propaganda, no matter how strongly resisted, at some level plants the seed of racial inferiority in listeners' minds. Further, it opens the door to even worse violations of the victim's person. Matsuda says rather than stretch the protection of the first amendment, free speech would be better served if the worst forms of racist speech were treated as special cases through a non-neutral, value-laden approach. On campuses, according to Matsuda, tolerance of racist speech is more harmful than in society at large because of students' vulnerabilities. "Minority students often come to the university at risk academically, socially, and psychologically. ..."[55] She suggests criminalization of a narrow, explicitly defined class of racist hate speech, providing public redress for the most serious harm, while leaving many forms of racist speech to private remedies. Interestingly, the *Doe* court cited Matsuda's work in an addendum that called her reasoning "important for consideration of a broader perspective of the issues."[56]

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[53]Her examples of other works on outsider jurisprudence include: Derrick Bell, AND WE ARE NOT SAVED (1987); Crenshaw, *Race, Reform, and Entrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 Harvard L. Rev. 1331 (1988); Littleton, *Equality and Feminist Legal Theory*, 48 U. Pitt. L. Rev. 1043 (1987), and Scales, *The Emergence of Feminist Jurisprudence*, 95 Yale L.J. 1373 (1986). See also Catharine MacKinnon, TOWARD A FEMINIST THEORY OF THE STATE (1989) and Patricia J. Williams,THE ALCHEMY OF RACE AND RIGHTS (Cambridge, Mass.: Harvard University Press), 1991.

[54]Id. at 2325.

[55]Id. at 2371.

[56]721 F. Supp at 869. The addendum lamented that a copy of the law review containing Matsuda's article arrived in chambers the day the court docketed the *Doe* opinion. "An earlier awareness of Professor Matsuda's paper certainly would have sharpened the Court's view of the issues," a footnote said. Id.

Even adamant free speech advocates are softening their position on regulating racist speech.[57] An example is Kent Greenawalt, who questions the first-amendment ideal which views all citizens as hardy.

> "Being impervious to epithets when one is a member of a privileged majority is much easier than when one belongs to a reviled minority, and a general encouragement of civic courage may be more likely if targeted racial and religious abuse is not allowed. Even 'courageous citizens' should not be expected to swallow such abuse without deep hurt, and being the victim of such abuse may not contribute to hardiness in ways that count positively for a democratic society."[58]

Greenawalt would allow victims to seek civil recovery for infliction of emotional distress. Despite the RAV ruling that hate speech inflict no special harm, it is instructive and broadens one's understanding of the issue to hear how a why some legal scholars would regulate campus hate-speech. Examples of their proposals follow.

LEGAL SCHOLARS SUPPORTING HARASSMENT CODES

Fourteen of the 22 legal scholars whose work is presented here support some form of campus harassment codes. An intriguing aspect of their defense of codes is that hate speech defies the spirit of the first amendment; so long heralded as the banner of justice, the first amendment helps perpetuate injustice when it is wielded by those who harass minorities.

Mary Ellen Gale calls for a new first amendment jurisprudence. "Even to suggest reimagining the first amendment is, in some circles,

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[57]See e.g. Schauer, *Mrs. Palsgraf and the First Amendment*, 47 Wash. & Lee L. Rev. 161 (1990) and Smolla, *Rethinking First Amendment assumptions about racist and sexist speech*, 47 Wash. & Lee L. Rev. 171 (1990).

[58]Greenawalt, 42 Rutgers L. Rev. at 307.

tantamount to heresy," she realizes.[59] She argues vociferously the "heroic ideal" of the first amendment fails to serve minorities such as blacks and women.[60] "Heterosexual white males ... often exalt the heroic ideal of the first amendment while seldom, if ever, suffering the consequences[61] A communitarian, Gale criticizes libertarian and marketplace of ideas approaches to first amendment jurisprudence that favor "the speakers' freedom and autonomy, and their contributions to educational discourse, to those of the victims. ... "[62] Despite her strident rhetoric, Gale suggests a "timid and limited" proposal to prohibit any message on campus "targeting specific individuals for harassment that threatens to destroy the fourteenth amendment right to educational equality and the first amendment right to equal liberty and equal voice."[63]

Charles Lawrence is a black professor who agrees minorities bear an undue burden for the ideal of free speech. "Whenever we decide that racist hate speech must be tolerated because of the importance of tolerating unpopular speech we ask blacks and other subordinated groups to bear a burden for the good of society. This amounts to white domination, pure and simple."[64] He argues hate speech poses a real threat to blacks: "It is a threat, a threat made in the context of a history of lynchings, beatings, and economic reprisals that made good on earlier threats, a threat that silences a potential speaker."[65] Unless citizens vigorously protest racism, Lawrence says the marketplace of ideas is an empty ideal. He sees three harms stemming from hate speech: psychic harm, reputational injury and denial of equal educational opportunity as required by *Brown v.*

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[59]Mary Ellen, Gale, *Reimagining the First Amendment: Racist speech and equal liberty*, (Symposium Celebrating the Bicentennial of the Bill of Rights, 1791-1991) 65 St. John's L. Rev. 119, 183 (1991).

[60]Id. at 137.

[61]Id. at 138.

[62]Id. at 185.

[63]Id. at 185.

[64]Charles Lawrence, *If he hollers, let him go: Regulating racist speech on campus*, 1990 Duke L. J. 431, 472, (1990).

[65]Id. at 472.

Board of Education.[66] Lawrence argues "narrowly drafted regulations of racist speech that prohibit face-to-face vilification and protect captive audiences from verbal and written harassment can be defended with the confines of existing first amendment doctrine."[67]

Thomas C. Grey, one of the framers of Stanford University's regulations, defends them as a mediation between civil rights and civil liberties concerns. Because it is a private university, Stanford has been treated as immune from constitutional limitations on codes. The Stanford code establishes a campus offense containing three elements: First, the speaker must intend to insult or degrade an individual or small groups on the basis of race, sex or other designated characteristics. Second, the speech must be directly addressed to the individual or individuals. Third, the speech must meet the fighting words standard. "This formula is a lawyerly attempt to define a concept everyone intuitively understands: the basic gutter epithets of racism, sexism, homophobia, and the like."[68] Grey says the rule is sufficiently narrow to avoid constitutional problems. "[B]y virtue of the requirement of individual address, even gutter epithets, used with degrading intent, can be uttered with impunity in a general publication or a speech to a general rally; Klan speech, neo-Nazi speech, and [Louis] Farrakhan-style speech do not violate the regulation."[69] While Evan G. S. Siegel decries codes in general, he would rely on the Stanford code's fighting-words standard to punish bias-motivated harassment."Calling someone 'nigger' to his face or writing 'dyke' on a student's dormitory door is deplorable behavior... Enacting policies that punish the perpetrators of ugly verbal abuse may help improve matters if such codes meet

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[66]Id. at 449.

[67]Id. at 457.

[68]Thomas C. Grey, *Discriminatory Harassment and Free Speech*, (The Future of Civil Rights Law: The Ninth Annual National Federalist Society Symposium on Law and Public Policy, 1990), 14 Harvard J. of Law and Public Policy 157, 161 (1991).

[69]Id.

constitutional scrutiny.[70] Toni M. Massaro also praises the Stanford code.[71] She says those who would substitute for harassment codes enforced discourse on race in special classes also raise constitutional problems because of the "potentially discourse-chilling impact of a required curriculum."[72]

Sean M. SeLegue finds the marketplace remedy inadequate for hate speech victims "because the assaultive aspects of epithets cannot be redressed by more speech."[73] SeLegue would draft regulations utilizing a "susceptibility doctrine" to create a "civility zone" in which an individual's liberty interest in being left alone constitutionally permitted a prohibition against assaultive speech. "Only those utterances targeted at a particular individual or identified group of individuals, in a context creating an intimidating and hostile environment, which the speaker knew or should have known would greatly upset the target, can be punished."[74]

Deborah R. Schwartz offers a model university anti-discrimination policy which would prohibit any expression which is:1.) Targeted at a religious, racial or historically oppressed group; and 2.) Derogatory to the point where the expression directly or implied denies the humanity of the group; and 3.) Expressed in an exclusionary manner which threatens the academic or social participation of the targeted.[75]

Patricia A. Hodulik, as senior counsel to the University of Wisconsin system, helped draft the University of Wisconsin code, later ruled unconstitutional, as part of a broader assault on campus racism. She defended the constitutionality of its use of employment-law concepts to regulate discriminatory harassment. "Workplace

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[70]Evan G.S. Siegel, *Closing the campus gates to free expression: The regulation of offensive speech at Colleges and Universities*, 39 Emory L. J. 1351, 1399, (1990).

[71]Toni M., Massaro, *Equality and freedom of expression: The hate speech dilemma*, 32 William and Mary L. Rev. 211, 265 (1991).

[72]Id. at 264.

[73]Sean M. SeLegue, *Campus anti slur regulations: Speakers, victims, and the First Amendment*, 79 California L. Rev. 919, 928 (1991).

[74]Id. at 955.

[75]Deborah R. Schwartz, *A First Amendment justification for regulating racist speech on campus*, 49 Case Western Reserv L. Rev. 733, 777 (1990).

principles limit expressive behavior that demeans on the basis of protected characteristics and creates a hostile work environment," she explained.[76] Hodulik referred specifically to civil rights legislation stemming from the fourteenth amendment's equal protection clause: Title VII[77] of the Civil Rights Act of 1964 requires work places be free from discriminatory intimidation, ridicule and insults, and Title IX[78] of the same act prohibits discrimination or harassment based on sex in federally funded educational programs. Ellen E. Lange also supports a Title VII approach to restricting racist speech on campus.[79] She notes Title VII focuses on the result of verbal conduct rather than its message. Because a university's primary purpose is education, she maintains a campus workplace harassment policy would require a higher level of harassment than Title VII. John T. Shapiro also turns to Title VII and Title IX for a model campus policy. It calls for a balancing approach between first amendment values and equal opportunity and equal protection. Under Shapiro's proposal, prohibited speech must be 1.) intended to insult or stigmatize an individual or small group on the basis of race, sex, religion, disability, sexual orientation, national origin, ancestry or ethnic origin; 2.) addressed directly to the individual or small group; and 3.) tantamount to fighting words or so pervasive or severe that it creates a hostile academic environment.[80]

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[76]Patricia A. Hodulik, *Prohibiting discriminatory harassment by regulating student speech: A balancing of First Amendment and university interests*, 16 J. of College and University Law 573, 582 (1990).

[77]78 Stat. 253 (1964) (coded as amended, 42 U.S.C. Sec. 2000e, *et. seq.* (1982 and Supp. V 1987).

[78]Public Law No. 92-318, 20 U.S.C. Sec. 1681 (1972), *et. seq.*

[79]Ellen E. Lange, *Racist speech on campus: a Title VII solution to a First Amendment problem*, 64 Southern California L. Rev. 105, 134 (1990). Her proposal states: "Ethnic, racial, religious, sexual, or handicap slurs and other verbal or physical conduct relating to an individual's national origin, race, religion, sex, sexual orientation, or physical handicap constitute harassment when this conduct: (1) Has the purpose or effect of creating an intimidating, hostile, or offensive educational environment; (2) has the purpose or effect of unreasonably interfering with an individual's academic performance; or (3) otherwise adversely affects an individual's educational opportunities." Id. at 128.

[80]Id. at 234.

Alan E. Brounstein calls for a fundamental compatibility test to craft codes based on the concept of university as public forum. Speech which would disrupt or impair the use to which the university as public forum is being put could be regulated. The state's interest in upholding the fourteenth amendment would outweigh first amendment values in a balancing test. Under this analysis, first amendment values would be preserved because only a "narrow class of expression, a small subset of the much larger category of controversial and offensive speech that might arise in a university setting, may be constrained..."[81] Mark Cammack and Susan Davies argue hate speech bans are justified in law school because hate speech inhibits victims' free speech. "Among other things, [hate speech] has the effect of preventing women and minorities from contributing to the free exchange of ideas."[82] Brad Baruch is another writer wary of speech codes nonetheless willing to accept narrowly tailored regulations using the fighting words approach justified by the great dangers of campus racism. The behavior must be directed at an individual in a face-to-face encounter; intended to create an intimidating, demeaning or hostile environment, and comprised of fighting words which would tend to provoke violence regardless of whether it occurred. [83]

Rodney A. Smolla is a staunch marketplace of ideas supporter who supports some limited regulation of campus hate speech. He says hate speech, the "Achilles heel of First Amendment jurisprudence," could be punished under the fighting words doctrine.[84]

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[81]Alan E. Brounstein, *Regulating hate speech at public universities; are First Amendment values functionally incompatible with equal protection principles?* 39 Buffalo L. Rev. 1, 25, (1991).

[82]Mark Cammack, and Susan Davies, *Should hate speech be prohibited in law schools?* 20 Southwestern University L. Rev. 145, 171 (1991).

[83]Brad Baruch, *Dangerous liaisons: campus racial harassment policies, the First Amendment, and the efficacy of suppression*, 11 Whittier L. Rev. 697, 721 (1990).

[84]Rodney A. Smolla, *Academic freedom, hate speech, and the idea of a university*, (Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles) 53 Law and Contemporary Problems 195, 224-225 (1990).

Katharine T. Bartlett and Jean O'Barr say the hate speech debate is incomplete because it only addresses regulation of the most blatant acts of racism, sexism and homophobia.[85] "[U]niversity administrators should publicly identify and condemn specific, objectionable behaviors - those that are subtle and unintentional as well as blatant and egregious, and those that cannot be legally regulated as well as those that can."[86]

Finally, Robert C. Post maintains the first amendment cannot be evaluated independently of social context. The "messy complications of the world" have rendered somewhat flawed our democratic ideals since they rest on the image of independent citizens deliberating together to form public opinion.[87] He concludes that "those who advocate [hate speech's] regulation in ways incompatible with the value of deliberative self-governance carry the burden of moving us to a different and more attractive vision of democracy."[88]

Despite these scholars' doubts, the marketplace of ideas remains a potent metaphor often cited by scholars who oppose harassment codes.

LEGAL SCHOLARS OPPOSING HARASSMENT CODES

At a role-playing exercise during a symposium sponsored by the Institute of Bill of Rights Law at the College of William and Mary, first-amendment scholars voted on whether to adopt various forms of hate-speech regulations. No proposal received more than a third of the audience's support."[89] The results demonstrate the antipathy with which the majority of first-amendment scholars view any

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[85]Katharine T. Bartlett, and Jean O'Barr, *The chilly climate on college campuses: An expansion of the 'hate speech' debate*, 1990 Duke L. J. 574, 583 (1990).

[86]*Id.* at 585-586.

[87]Robert C. Post, *Racist speech, democracy, and the First Amendment*, 32 William and Mary L. Rev. 267, 326 (1991).

[88]Id. at 327.

[89]Smolla, 32 William and Mary L. Rev. at 209.

regulation of any speech. AEJMC, for instance, passed a resolution in August of 1991 opposing any campus codes that restrict speech.[90]

The six law journal articles listed here whose authors oppose campus codes largely rely on liberal first amendment doctrine to refute the constitutionality or desirability of codes. Nadine Strossen, president of the ACLU, believes steadfastly in the "more speech" approach to combatting hate speech because she doubts punishment will change attitudes. "If the marketplace of ideas cannot be trusted to winnow out the hateful, then there is no reason to believe that censorship will do so," she writes.[91]

Gerald Gunther, author of the textbook Constitutional Law and a member of the Stanford faculty, opposed proposed revisions (they failed) to that school's harassment codes which would have outlawed "personal abuse" and group defamation.[92] He cites the broad protection courts have afforded offensive expression.

Eric D. Bender opposes speech codes because of their "futility and unconstitutionality."[93] He dismisses concerns about "the tendency of racist speech to spread the idea of racism. ... It is simply a necessary risk for a nation committed to the principle of liberty." He suggests targets sling back some mud of their own: "Victims are always free to respond with antiracist speech, or equally important, racist speech of their own."[94] Anthony D'Amato writes that because our definitions

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[90]"AEJMC," AEJMC NEWS, at 2-3."Our traditions as an association come down clearly on the side of 'individual independence.' In the case of the 'hate speech' issue, that translates into support for freedom of expression. ... It seems a fitting way for us to formally conclude our celebration of the bicentennial of the First Amendment." AEJMC also urged individual members to voice opposition to such codes. It encourages schools to counter hate speech and maintain classroom environments that promote learning and reasoned discourse. Id.

[91]Nadine Strossen, *Regulating racist speech: A modest proposal?*1990 Duke L. J. 484, 560, (1990).

[92]Gerald Gunther, *Good speech, bad speech - should universities restrict expression that Is racist or otherwise denigrating? No.*, 24 Stanford Lawyer 7 (Spring 1990).

[93]Eric D. Bender, *The viability of racist speech from high schools to universities: a welcome articulation?* 58 University of Cincinnati L. Rev. 874, 898 (1991).

[94]David F. McGowan and Ragesh K. Tangri, *A Libertarian critique of university restrictions of offensive speech*, 79 Calif. L. Rev. 825, 888.

of racism or offensiveness change over time, it is impossible to regulate expression.[95] He would deny action to anyone who claims an utterance causes harm. David F. McGowan and Ragesh K. Tangri offer a libertarian critique of hate-speech regulations. While conceding the Nazi experience in Germany illustrates the fallacy of the dogma truth will prevail, they conclude marketplace theory remains sound and precludes speech regulations. They adhere to the philosophy "the remedy for bad speech is more speech."[96]

Peter Linzer, whose arguments against hate-speech proscriptions come closest to those articulated by the U.S. Supreme Court in *RAV*, rejects speech codes because of their doubled-edged slippery slope, which he argues makes dangerous the approach of Delgado and Matsuda.[97] One slippery slope involves the question of why limit speech codes to racist speech; the second involves what comprises racist speech. "[T]he biggest danger is that a racist speech exception to the first amendment will provide an opening for those hostile to free speech generally," Linzer warns.[98] He argues the best remedy to racist speech is organized private opposition to hate speech of any kind.

On campuses, Linzer specifically recommends citizens speak out against racism, promote talks, discussions and education on the evils of racism and boycott racist organizations. "The more we call out the names of the respectable people who are supporting racist speech, the more we boycott them and the racist speakers, and the more we speak out against racist speech, the more we will stop racist speech," he concludes.[99] Fraternities, which he says often are associated with hate speech events, should be accountable for high standards of civility. Housing should be subject to greater regulation to uphold

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[95]Anthony D'Amato, *Harmful speech and the culture of indeterminacy*, 32 William and Mary L. Rev. 329 (1991).
[96]Id. at 888.
[97]Peter Linzer, *White liberal looks at racist speech*, (Symposium Celebrating the Bicentennial of the Bill of Rights, 1791-1991) 65 St. John's L. Rev.187, 236-243 (1991).
[98]Id. at 219.
[99]Id.

standards of civility. Criminal law, Linzer believes, applies to implied threats involving hate speech.

This review of recent law review articles indicates scholars disagree less about campus harassment codes than the level of debate indicates. One common thread among the legal scholars is their recognition of the ubiquity of campus racism. The proponents of codes agree academic discourse should remain unfettered by overly restrictive codes; they focus on regulating offensive expression targeted at individuals which makes no contribution to self-fulfillment, self-governance or a search for truth. Because the listeners' right to self-fulfillment, privacy and education are infringed upon by hate speech, they believe it can and should be regulated. Interestingly, often writers who came from different ends of the spectrum--those loudly wary of restricting free speech and those emphasizing the burden of harmful speech upon individuals--ended up in near agreement as to how far universities actually should go in regulating racist campus speech. Despite her diatribe about the first amendment's shortcomings, Gale, for instance, would prohibit only harassing speech addressed to an individual. Linzer, who rejects codes, would regulate behavior in campus housing - and he'd keep a close eye on fraternities. While they place themselves at opposite sides of the theoretical debate, Gale and Linzer illustrate how the alleged chasm between harassment code proponents and opponents actually is only a matter of degree. Both sides value the first amendment. What is striking is the high level of agreement among a variety of legal scholars that something is amiss - theoretically and spiritually - when the first amendment is wielded by bullies. The scholars seek to creatively redress the imbalance created by classic liberal first amendment doctrine so that the first amendment remains the banner of the disempowered.

These scholars suggestions became moot following the Supreme Court ruling in *RAV*, which will be discused in the next section.

THE RAV RULING'S IMPACT ON CAMPUS SPEECH CODES

The *RAV* ruling means universities no longer can proscribe hate speech directed at only certain categories such as race, sex or

religion, since such selectivity indicates authorities are trying to "handicap the expression of particular ideas," Justice Scalia said. Under this reasoning, codes must apply to all students or none. Further, the majority created a new fighting-words interpretation which found unprotected only the mode in which fighting words are expressed. So only general laws not addressed at hate crimes' now-protected message can be used to punish hate crimes. Justice White's concurrence objected to this interpretation, warning that the majority "legitimates hate speech as a form of public discussion" by recognizing its message of intimidation.[100]

The Court displayed such animosity toward hate-crime laws it prompted Justice Blackmun to label the majority opinion a misplaced stab at political correctness.[101] Legal experts also interpreted the decision as a reaction to fear of liberal orthodoxy, especially among the nation's universities. "What you are seeing today is a conservative backlash to political correctness," said Rodney Smolla, one of the scholars quoted above in favor of campus harassment codes targeted at fighting words.[102] News commentators approved. "In too many places, especially the nation's universities, the movement toward 'political correctness' has resulted in rules that severely--and we think improperly--restrict the free speech of students and faculty alike," the *Atlanta Journal* said.[103]

Ironically, the ruling may create more restrictions on speech. Since it opposes categorizing speech, authorities must restrict more speech than they consider necessary to further a social goal. And

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[100]1992 WL 135564, * 12 (U.S). The four concurring justices, Justices White, Blackmun, O'Connor and Stevens, would have thrown out the statute strictly on overbreadth grounds; they believe it is constitutionally permissible to single out racist or other categories of fighting words for proscription.

[101]Id. at *19. Blackmun said, "the court has been distracted from its proper mission by the temptation to decide the issue over 'politically correct speech' and 'cultural diversity,' neither of which is presented here." Id.

[102]Tony Mauro, *Free speech is now conservatives' cause*, USA Today, June 23, 1992, at 8A.

[103]*Ignoring Bill of Rights is no way to fight racism*, Atlanta Journal, June 25, 1992, at A14.

RAV makes it easier to separate conduct from speech, creating more loopholes to restrictions on expressive conduct or symbolic expression.

Oddly, the majority mistakenly interpreted the St. Paul law as favoring only one side of a debate. Scalia wrote, "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules" [104] This is especially strange when applied to the St. Paul cross burning, since it implies the victimized family bullied the cross-burning culprits by bringing charges against them. Further, the city prohibitions against racist and other fighting words applied to both blacks and whites.

Another perplexing aspect of the ruling is Justice Clarence Thomas' failure to address the question of harm to suspect classes inflicted by hate speech, since as former head of the Equal Employment Opportunity Commission his charge was to uphold the fourteenth amendment's guarantee of equal protection in recognition of past discrimination. Perhaps Thomas's influence was at work in the majority's justification of Title VII laws prohibiting sexual harassment in the workplace in spite of its *RAV* ruling. Under *RAV* , singling out sexually harassing speech would appear to be unconstitutional. But the majority said Title V11 is an exception to the *RAV* ruling because its censorship of sexually harassing messages is aimed not at the primary effect of personal hurt but at the secondary effect of preventing workplace discrimination. But under that reasoning, universities could argue that hate-speech proscriptions similarly are aimed at preventing discrimination in education, as suggested by several scholars above, in accordance with the equal-protection requirements of the fourteenth amendment.

The Title VII exception casts doubt on the sincerity of the Court's newfound commitment to free speech. The Court has permitted content-based proscription of certain categories of speech in other areas. For instance, in the transportation industry, airline advertising is singled out for regulation,[105] on the grounds the risk of fraud is

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[104]1992 WL 135564, *7 (U.S.).

[105]Morales v. Trans World Airlines, Inc., 504 U.S. --- (1992).

greater among airlines.[106] In *U.S. v. Watts*, the Court found it constitutional to single out as a federal crime only those threats of violence that are directed against the President because of their special force.[107] Similarly, the federal government may single out liquor and cigarette television advertising for content-based bans because of those products' perceived harm. And the Court has ruled bans on child pornography are constitutional on the principle that child pornography inflicts a special harm on its subjects that justifies singling it out.[108] Only weeks before the *RAV* ruling, the Court upheld a content-based restriction prohibiting political speech in the vicinity of polling places. In *Burson v. Freeman*, the Court said the state's compelling interest in electioneering justified permitting content-based bans on political speech at polling places--but not other kinds of speech.[109] But the same argument could be used to justify hate-crime laws--if one buys the argument it inflicts harm in and of itself. Further, Chief Justice Rehnquist, would have upheld content-based laws criminalizing flag burning, indicating he believes the government is less capable of withstanding offensive symbolism than is an isolated black family victimized by cross burning in the middle of night.[110]

Two dangerously restrictive free-speech precedents set by the 1990s' Court further demonstrate it is too soon to laud it as a champion of free speech. Again, these decisions reflect its values. In *Rust v. Sullivan*, the Court approved regulations barring staffers at federally funded planning clinics from discussing abortion.[111] In *Barnes v. Glen Theatre, Inc.*, it said states can prohibit nude barroom dancing, even though the activity comprised protected expression, on the grounds states' interest in upholding morality overrides the first-

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[106]1992 WL 135564, *5 (U.S.).
[107]394 U.S. 705, 707 (1969).
[108]New York v. Ferber, 458 U.S. 747 (1982).
[109]504 U.S. --- (1992).
[110]Texas v. Johnson, 491 U.S. 397 (1989).
[111]111 S.Ct. 1759, --- U.S. --- (1991) (staff at federally funded family planning clinics barred from mentioning abortion).

amendment interests at stake.[112] In these cases, the Court revealed what interests it finds more important than free speech--morality, abortion, fraudulent advertising, election fraud, threats against the President and child pornography. The point here is not to condone these speech restrictions but to illustrate that the Court, as it accused St. Paul, is not loathe to restricting speech on "disfavored subjects."[113] As Justice Stevens' concurrence noted, "This new absolutism in the prohibition of content-based regulations severely contorts the fabric of settled first Amendment law."[114]

The *RAV* ruling reflects the conservative majority's distaste of group favoritism rather than any reverence for free speech. Justice Scalia, in particular, has looked askance at affirmative-action programs. "The St. Paul opinion represents yet another battle in Scalia's continuing campaign against group rights (a.k.a. affirmative action)," said one approving columnist.[115] At least one scholar believes the ruling bodes poorly for affirmative action plans. "It seems that five justices are saying there is no special need to recognize the history of discrimination," said Roger Goldman, a law professor at St. Louis University.[116]

Inevitably, the courts will get further opportunities to mediate the occasional conflict between civil rights and civil liberties inherent in the hate-speech debate. Perhaps blanket speech codes that cover all students and general sanctions against illegal racist conduct will be sufficient to quash campus racism. But to end the hate-speech debate with what *The New York Times* called the *RAV* majority's "bland insistence on the moral equivalency of speech"[117] does shortsighted

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[112]Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456, --- U.S. --- (1991). Justice Scalia's concurrence said no first amendment issues were at stake since he found nude barroom dancing to be conduct.

[113]1992 WI 135564, *6 (U.S.).

[114]Id. at *22 (U.S.).

[115]Charles Krauthammer, *Scalia's noble fight*, The Washington Post, June 28, 1992, at C7. "It is for this dogged resistance to the balkanization of America ... that Scalia stands out as the Reagan presidency's finest legacy."

[116]William H. Freivogel, *What Scalia didn't say*, The (Durham, N.C.) Herald-Sun, June 28, 1992, at G1, G2.

[117]Greenhouse, *2 visions*, N.Y. Times, at A11.

disservice to the spirit of the first amendment, which was crafted and historically wielded as a weapon of the oppressed, not their oppressors. That is the lesson to be learned from the emerging new view of first amendment jurisprudence.